No. 07-96

FILED
AUG 17 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

CONCERNED COMMUNITY
INVOLVED DEVELOPMENT, INC.,

Petitioner,

v.

CITY OF HOUSTON, TEXAS, CANDLELIGHT DEVELOPMENT JOINT VENTURE, CANDEV, L.C., CANDLELIGHT PLACE DEVELOPMENT, LLC, AND LAZER CONSTRUCTION COMPANY, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The Fourteenth Court Of Appeals Of Texas

BRIEF FOR RESPONDENTS, CANDLELIGHT DEVELOPMENT JOINT VENTURE, CANDEV, L.C., CANDLELIGHT PLACE DEVELOPMENT, LLC, AND LAZER CONSTRUCTION COMPANY, INC. IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether Petitioner lacks standing to bring the Petition for Writ of Certiorari because Petitioner's cause of action is moot since Petitioner seeks to enjoin an event which has occurred.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinion Below	1
Statement of Jurisdiction	1
Statement	1
Argument	2
Conclusion	5
Appendix	A-1

TABLE OF AUTHORITIES

Page

CASES

Bayou Liberty Association, Inc. v. United States Army Corps of Engineers and Wal-Mart Stores, Inc.; Home Depot USA, Inc., Intervenors, 217 F.3d 393 (5th Cir. 2000) 4

Continental Pipe Line Co. v. Gandy, 142 S.W. 2d 631 (Tex. Civ. App., San Antonio, 1940, no writ) 2

Cooper v. Milam, 256 S.W. 2d 196 (Tex. Civ. App., Waco, 1953, no writ) 2, 3

Corpus Christi Developers, Inc. v. Chiles, 275 S.W. 2d 700 (Tex. Civ. App., San Antonio, 1955, no writ) 2

Green v. Gregg, 520 S.W. 2d 924 (Tex. Civ. App., Tyler [12th Dist.], 1975, no writ) 2

Harris v. City of Houston, 151 F.3d 186 (5th Cir. 1998) 4

Hopkins v. City of Dallas, 106 S.W. 2d 783 (Tex. Civ. App., Fort Worth, 1937, writ ref'd.) 5

Isbell v. Rednick, 193 S.W. 2d 736 (Tex. Civ. App., Waco, 1946, no writ) 2

Roadrunner Investments, Inc. v. Texas Utilities Fuel Company, 526 S.W. 2d 615 (Tex. Civ. App., Fort Worth [2nd Dist.] 1975, no writ) 2, 5

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The Opinion of the Court of Appeals is reported at 209 S.W. 3d 666.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on September 26, 2006. A Petition for Review was denied by the Supreme Court of Texas on April 27, 2007. The Petition for Writ of Certiorari was filed on July 25, 2007. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

STATEMENT

The Statement is modified by the following additional facts:

(1) Subsequent to the denial of temporary injunction by the trial court, Respondents constructed the bridge within the public right-of-way for Rosslyn Road in Houston, Harris County, Texas. The date of final completion of the work performed was established as July 26, 2006. On July 28, 2006, the City of Houston Department of Public Works and Engineering accepted the work as complete and accepted responsibility for security, maintenance, heating, ventilating, air conditioning, utilities, damage to the work and insurance, that has not been previously transferred from Contractor.

(2) The Affidavit of Alvin L. Freeman with attached Certificate of Final Completion regarding completion of the bridge are attached hereto.

ARGUMENT

The only relief which Petitioner sought against Respondents herein was a temporary and permanent injunction enjoining construction of a bridge across a drainage ditch along Rosslyn Road in Harris County, Texas. The trial court denied Petitioner's Application for Temporary Injunction and the appellate court affirmed the judgment of the trial court on this issue.

The Texas courts have, on numerous occasions, held that a court may not enjoin the performance of an act or a deed which is already accomplished. *Isbell v. Rednick,* 193 S.W. 2d 736, 737 (Tex. Civ. App., Waco, 1946, no writ); *Cooper v. Milam,* 256 S.W. 2d 196, 200, 201 (Tex. Civ. App., Waco, 1953, no writ); *Corpus Christi Developers, Inc. v. Chiles,* 275 S.W. 2d 700, 701 (Tex. Civ. App., San Antonio, 1955, no writ); *Green v. Gregg,* 520 S.W. 2d 924, 926, 927 (Tex. Civ. App., Tyler [12th Dist.], 1975, no writ). The court in *Continental Pipeline Company v. Gandy,* 142 S.W. 2d 631 (Tex. Civ. App., San Antonio, 1940, no writ) stated. "The preliminary question, however, of whether appellant shall or shall not construct its telephone line and put it in operation is no longer a live subject of controversy, since those acts have been actually consummated, and are existing facts and this court may not now, in this proceeding for temporary injunction, say whether those acts were wrongfully committed." The court, in the case of *Roadrunner Investments, Inc. v. Texas Utilities Fuel Company,* 526

S.W. 2d 615, 616, 617 (Tex. Civ. App., Fort Worth [2nd Dist.], 1975, no writ) states on page 617:

> Roadrunner's reason for seeking to enjoin the condemnation proceeding was to prevent it from reaching the stage to where TUFCO, by means of that suit, could get possession of Roadrunner's land and build its pipeline thereon. A temporary injunction enjoining TUFCO from further proceeding with the condemnation case prior to a hearing on the merits of this case could no longer have any practical legal effect on the matter, because the pipeline is now already in existence. The question of whether or not the pipeline was wrongfully built on Roadrunner's land could not be determined at a hearing of an application for the temporary injunction.

The case of *Cooper v. Milam, supra,* involved the issue of whether the Citizens National Bank should be prohibited from voting certain stock in favor of a partial capital liquidating dividend and prohibiting the company and its president from counting such vote or paying the dividend so voted. The court, in that case, at page 201, stated: "Preventive injunctions necessarily operate only upon unperformed and unexecuted acts. It is axiomatic that a prohibitory injunction against the performance of an act or a deed which has already been accomplished is futile and useless." The court further stated at page 200:

> Although we are inclined to the view that the record before us fails to disclose an abuse of discretion on the part of the trial judge in refusing to grant appellant's application for a temporary injunction, we do not think it is necessary or proper for this court to pass upon that question or to determine at this time whether appellant or the

> Bank had the right or duty to vote the Barrett Stock on December 3, 1952, or to decide whether the trial court did or did not err in refusing to grant the application because it now appears that the acts which appellant sought to enjoin have been performed and hence we have concluded that Petitioner's application for a temporary injunction has become moot.

The Fifth Circuit Court of Appeals, in the case of *Bayou Liberty Association, Inc. v. United States Army Corps of Engineers and Wal-Mart Stores, Inc.; Home Depot USA, Inc., Intervenors*, 217 F.3d 393 (5th Cir. 2000), at page 396, states: "We have consistently found that a request for injunctive relief is moot when the event sought to be enjoined has occurred. Id. (citations omitted). When a party seeks an injunction to halt a construction project the case may become moot when a substantial portion of that project is completed. . . ."

In the case of *Harris v. City of Houston*, 151 F.3d 186 at page 189, the court states: "As an initial matter, we find it beyond dispute that a request for injunctive relief generally becomes moot upon the happening of the event sought to be enjoined . . . " Once the action that the plaintiff sought to have enjoined has occurred, the case is mooted because 'no order of this court could affect the parties' rights with respect to the injunction we are called upon to review' . . . "At page 191, the court states: "When a civil case becomes moot pending appellate adjudication, the established practice in the federal system is to reverse or vacate the judgment below and remand with a direction to dismiss."

When facts have occurred pending an appeal of a case that are not shown by the record that have rendered the

appeal moot, such facts can be proved to the appellate court by means of affidavits. *Roadrunner Investments, Inc. v. Texas Utilities Fuel Company, supra*, at page 616; *Hopkins v. City of Dallas,* 106 S.W. 2d 783, 784 (Tex. Civ. App., Fort Worth, 1937, writ ref'd.).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

DATED August 16, 2007.

Respectfully submitted,

ALVIN L. FREEMAN
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AFFIDAVIT

THE STATE OF TEXAS §
§ KNOW ALL MEN BY
COUNTY OF HARRIS § THESE PRESENTS:

BEFORE ME, the undersigned Notary Public, on this day personally appeared ALVIN L. FREEMAN who, after having first been duly sworn, upon his oath did depose and say:

1. My name is ALVIN L. FREEMAN. I have never been convicted of a felony or a crime involving moral turpitude and I am competent to execute this Affidavit, which is based upon my personal knowledge.

2. I am the Administrative Manager of Candlelight Development Joint Venture. I have personally participated in development of Candlelight Place Section 3, a subdivision along Rosslyn Road in Harris County, Texas. A portion of the development of the subdivision included paving and drainage facilities and construction of a bridge to serve Rosslyn Road. The bridge was constructed across a Harris County drainage ditch granting access to Candlelight

Place Section 3 across Rosslyn Road. The plans for construction of the paving and drainage facilities (including the bridge) were approved by the City of Houston Public Works and Engineering Department and were assigned Drawing No. 40080.

3. Construction of the bridge was completed in the Summer of 2006. The date of final completion of the work was established by the City of Houston as July 26, 2006.

4. Attached hereto is a Certificate of Final Completion, executed by the Chief Inspector of the City of Houston and the Houston City Engineer certifying final completion of paving and drainage facilities serving the Subdivision. Included among the drawing numbers certified as having been finally completed is Drawing No. 40080.

5. FURTHER AFFIANT SAITH NOT.

/s/ Alvin L. Freeman
ALVIN L. FREEMAN

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

This instrument was acknowledged before me on this the 14th day of August, 2007, by ALVIN L. FREEMAN.

/s/ Tina A. Hayden
NOTARY PUBLIC,
STATE OF TEXAS

[SEAL] TINA A. HAYDEN
MY COMMISSION EXPIRES
August 26, 2009

CITY OF HOUSTON
STANDARD DPC DOCUMENT

CERTIFICATE OF FINAL COMPLETION

Document 00650

CERTIFICATE OF FINAL COMPLETION

PROJECT: Candlight Place See 3

CONTRACT No.: ___ PROJECT No.: Paving 609455 DWG 37775
Water C16231 DWG 40080
Storm 607970
Key Map 452-E
Sanitary 613005

TO: Lazer Construction Co
Contractor and
Address for Written Notice 3405 Almeda Genova Road
Hou. Tx 77047

1.01 DATE OF FINAL COMPLETION

The Work performed under the Contract was inspected on 6-27-06 and found to be complete. The date of final completion of the Work is hereby established as 7-26-06.

1.02 PUNCH LIST

Contractor certified in Document 00641 – Contractor's Certification of Final Completion that all Punch List items were completed or corrected. Failure to identify incomplete work items or requirements of the Contract prior to issuance of this Certificate does not alter the responsibility of Contractor to comply with all provisions of the Contract.

1.03 ACCEPTANCE OF THE WORK

Based on inspection and to the best of our knowledge, information and belief, the Work has been

completed in accordance with the terms and conditions of the Contract and we recommend acceptance of the Work by City Council or their delegated authority.

Tom Shepherd	/s/	Tom Shepherd	7/26/06
Developer/Contractor		Signature	Date
Shailesh Patel	/s/	Shailesh Patel	7/26/06
Chief Inspector, City of Houston		Signature	Date
for John J. Sakolosky, P.E.	/s/	Rajiv Arya	7/28/06
City Engineer		Signature	Date

1.04 TRANSITION OF RESPONSIBILITIES

Except as provided in the Contracting documents attached hereto, Department of Public Works & Engineering accepts the Work as complete and accepts responsibility for security, maintenance, heating, ventilating, air conditioning, utilities, damage to the Work, and insurance, that has not been previously transferred from Contractor.

for John J. Sakolosky, P.E.	/s/	Rajiv Arya	7/28/06
For Public Utilities and R-O-W Fleet Management		Signature	Date

cc: [*Design Consultant*], Jeff Taylor Erin Dargan, File]